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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MANUEL PEREZ INZUNZA, Defendant and Appellant.	B288621 (Los Angeles County Super. Ct. No. BA119181)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Manuel Perez Inzunza appeals from an order denying his petition under Proposition 36, the Three Strikes Reform Act of 2012 (Pen. Code, § 1170.126),[1] for recall of his sentence imposed for conviction of possession of a firearm by a felon. Inzunza contends the trial court erred in finding he was armed with a firearm during the commission of an offense, and thus ineligible for resentencing. We reject Inzunza's contention there must be a facilitative nexus between his possession of a firearm and his commission of another offense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Evidence at Trial*

On the morning of August 3, 1995 a police officer observed Inzunza sitting in the front passenger seat of an adjacent vehicle. Inzunza appeared to be under the influence of an opiate. Two police officers followed Inzunza's vehicle and pulled it over. A patdown search of Inzunza revealed a loaded .25-caliber semiautomatic handgun concealed inside of his pants in the groin area. He was taken to the police station and determined to be under the influence of an opiate. (*People v. Inzunza* (Feb. 24, 1997, B102291) [nonpub. opn.] (*Inzunza I*).)

B. *Jury Verdict and Sentencing*

A jury convicted Inzunza of possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)(1)) and being under the influence of a controlled substance (Health & Saf. Code, § 11550, subd. (a)). (*Inzunza I, supra*, B102291.) In a bifurcated

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[1] All further statutory references are to the Penal Code unless otherwise noted.

trial the jury found true the allegation Inzunza suffered three prior robbery convictions, which were serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and served six prior prison terms within the meaning of section 667.5, subdivision (b). (*Inzunza I, supra*, B102291.)

The trial court sentenced Inzunza to 31 years to life, including 25 years to life for possession of a firearm by a felon, calculated as a third strike under the three strikes law, plus six consecutive one-year sentences for each of the prior prison terms pursuant to section 667.5, subdivision (b). (*Inzunza I, supra*, B102291.)

C. *Inzunza's Petition for Recall of Sentence*

On November 30, 2012 Inzunza filed a petition for recall of sentence under Proposition 36. He argued possession of a firearm by a felon was an offense eligible for resentencing under Proposition 36 (§ 1170.126, subd. (e)(2); see §§ 667, subd. (e)(2)(C)(i)-(iii), 1170.12, subd. (c)(2)(C)(i)-(iii)), and none of his prior serious or violent felony convictions disqualified him from having his sentence recalled (§ 1170.126, subd. (e)(3); see §§ 667, subd. (e)(2)(C)(iv), 1170.12, subd. (c)(2)(C)(iv)). The superior court issued an order to show cause why his sentence should not be recalled.

The People filed an opposition, a supplemental opposition, and an amended supplemental opposition to the petition. The People contended Inzunza was ineligible for resentencing under section 1170.126, subdivision (e)(2), because "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).) The People also argued Inzunza was unsuitable for resentencing given his criminal record and disciplinary history while in prison. In his reply brief, Inzunza

asserted his possession of a firearm, absent a facilitative nexus to a separate offense, did not render him ineligible for resentencing.

On February 26, 2018 the superior court held a hearing on Inzunza's eligibility for resentencing.[2] At the beginning of the hearing the trial court stated, "When the defendant was stopped by the police, he had a loaded .25 caliber semi-automatic handgun in his pants. So I would find him ineligible. The firearm was readily available for offensive and defensive use and I would make that finding beyond a reasonable doubt." Inzunza's counsel rested on the argument presented in his reply brief that Inzunza was eligible for resentencing because his possession of a firearm was not tethered to another offense. The superior court ruled, "The court finds beyond a reasonable doubt [Inzunza is] statutorily ineligible for recall[] and resentencing pursuant to Penal Code section 1170.126 because during the commission of the current offense, he was armed with a firearm." The court denied the petition. Inzunza timely appealed.

DISCUSSION

A. *The Three Strikes Reform Act of 2012 (Proposition 36)*

Prior to approval of Proposition 36, the three strikes law provided that defendants who committed a felony and had two or more prior convictions for serious or violent felonies were to be sentenced to an indeterminate term of life imprisonment with a minimum term of at least 25 years. (Former § 1170.12, subds. (b), (c)(2)(A); *People v. Perez* (2018) 4 Cal.5th 1055, 1061-1062 (*Perez*); *People v. Estrada* (2017) 3 Cal.5th 661, 666-667 (*Estrada*).)

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[2] There were numerous extensions of the briefing schedule, and Inzunza filed his reply brief on December 15, 2017.

"Following enactment of Proposition 36, defendants are now subject to a lesser sentence when they have two or more prior strikes and are convicted of a felony that is neither serious nor violent, unless an exception applies." (*Estrada, supra*, 3 Cal.5th at p. 667.) A defendant falls within one of the exceptions to eligibility if "[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

Proposition 36 applies both prospectively and retroactively to defendants who were previously sentenced under the three strikes law. (*Estrada, supra*, 3 Cal.5th at p. 667.) "For those sentenced under the scheme previously in force, [Proposition 36] establishes procedures for convicted individuals to seek resentencing in accordance with the new sentencing rules. (§ 1170.126.) The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony *and* was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including the use of a firearm during the commission of the offense. Second, an inmate must be suitable for resentencing." (*Estrada*, at p. 667.)

On a petition for resentencing under Proposition 36, the prosecutor must prove the defendant is ineligible for resentencing beyond a reasonable doubt. (*Perez*, *supra*, 4 Cal.5th at p. 1059; accord, *People v. Frierson* (2017) 4 Cal.5th 225, 230, 236 (*Frierson*).) Whether a defendant is ineligible for resentencing on undisputed facts is a pure question of law, which we review de novo. (*In re R.T.* (2017) 3 Cal.5th 622, 627; *People v. Prunty* (2015) 62 Cal.4th 59, 71;

People v. Bradford (2014) 227 Cal.App.4th 1322, 1332 [construction of Prop. 36 reviewed de novo].)

B. *A Defendant May Be Ineligible for Resentencing Under Proposition 36 for a Conviction of Possession of a Firearm by a Felon Without a Facilitative Nexus to Another Offense*

A defendant is ineligible for resentencing if "[d]uring the commission of the current offense, the defendant . . . was armed with a firearm or deadly weapon . . . ." (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii); see § 1170.126, subd. (e)(2).) "'"[A]rmed with a firearm" [or weapon] has been statutorily defined and judicially construed to mean having a firearm [or weapon] available for use, either offensively or defensively. [Citations.]' [Citation.] It is the availability of and ready access to the weapon that constitutes arming." (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110 (*Cruz*); accord, *People v. Bland* (1995) 10 Cal.4th 991, 997 (*Bland*) ["A defendant is *armed* if the defendant has the specified weapon available for use, either offensively or defensively."]; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1029 (*Osuna*) [same], disapproved on another ground in *Frierson, supra*, 4 Cal.5th at p. 240, fn. 8.)[3]

Inzunza contends a defendant is not disqualified from resentencing for a conviction of possession of a firearm by a felon under former section 12021, subdivision (a), unless the defendant was armed with a firearm during commission of "*another* offense to which the arming attaches." However, every appellate court that

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[3] As discussed below, the Supreme Court in *Frierson* concluded that the People must plead and prove the defendant is ineligible for resentencing under Proposition 36 beyond a reasonable doubt, disapproving the holding in *Osuna* that a preponderance of the evidence standard applies.

has considered resentencing under Proposition 36 for a conviction of possession of a firearm by a felon under former section 12021, subdivision (a), has rejected this argument. (See *People v. White* (2016) 243 Cal.App.4th 1354, 1363 [Proposition 36 does "not exclude possessory offenses as a basis for finding a defendant was armed for purposes of determining eligibility for resentencing relief . . . ."]; *People v. Burnes* (2015) 242 Cal.App.4th 1452, 1458 ["'[A] person convicted of being a felon in possession of a firearm is not automatically disqualified from resentencing by virtue of that conviction; such a person is disqualified only if he or she had the firearm available for offensive or defensive use.'"]; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-284 [affirming denial of resentencing petition for conviction of former § 12021, subd. (a), rejecting defendant's argument that "there must be an underlying felony to which the arming is 'tethered'"]; *Osuna, supra*, 225 Cal.App.4th at pp. 1029-1030 [rejecting argument that a defendant is only disqualified from resentencing for a conviction of former § 12021, subd. (a), if there is "an underlying felony to which the firearm possession is 'tethered'"]; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1054 ["the phrase '[d]uring the commission of the current offense, the defendant . . . was armed with a firearm . . . ,' . . . extends to situations in which the defendant was convicted of violating [former] section 12021 *if* the defendant had the firearm he or she was convicted of possessing available for use, either offensively or defensively"].) We agree with the reasoning of our colleagues in these and other cases concluding a facilitative nexus is not required for a defendant to be ineligible for resentencing based on his or her being armed during the commission of the offense.

Inzunza argues that if the electorate intended to make defendants convicted of possession of a firearm by a felon ineligible

for resentencing under Proposition 36, it would have listed former section 12021, subdivision (a), as an excluded offense under section 1170.126, subdivision (e)(2), but did not do so. But a defendant can be convicted of possession of a firearm based on constructive possession of the firearm where the firearm is under the person's dominion and control, even though it is not available for use. (*People v. Blakely, supra*, 225 Cal.App.4th at p. 1052; *Osuna, supra*, 225 Cal.App.4th at p. 1030.)

As the court in *Osuna* observed, "A firearm can be under a person's dominion and control without it being available for use. For example, suppose a parolee's residence (in which only he lives) is searched and a firearm is found next to his bed. The parolee is in possession of the firearm, because it is under his dominion and control. If he is not home at the time, however, he is not armed with the firearm, because it is not readily available to him for offensive or defensive use. Accordingly, possessing a firearm does not necessarily constitute being armed with a firearm." (*Osuna, supra*, 225 Cal.App.4th at p. 1030.) In *Osuna*, there was evidence that the defendant was holding a handgun when apprehended by the police. "Thus, factually he was 'armed with a firearm' within the meaning of [Proposition 36]." (*Ibid*.)

As our colleagues in *Osuna* concluded, "In light of the clear evidence of voters' intent, we reject the claim[] that disqualification for resentencing under Proposition 36 requires . . . that a conviction for possession of a firearm cannot constitute being 'armed' with a firearm for eligibility purposes." (*Osuna, supra*, 225 Cal.App.4th at p. 1038.)

Inzunza also cites the Supreme Court's holding in *Bland* that for the purpose of imposition of the firearm sentence enhancement under former section 12022, subdivision (a), there must be a facilitative nexus between the arming with a firearm and "'some

purpose or effect with respect to the drug trafficking crime . . . .'" (*Bland, supra*, 10 Cal.4th at p. 1002.)

However, the Supreme Court in *Estrada* rejected the argument that a facilitative nexus requirement applies to resentencing under Proposition 36, explaining, "What is more, section 1170.12, subdivision (c)(2)(C)(iii) provides only one express nexus requirement between these general descriptive terms and the inmate's prior offense: the excluding conduct must occur '[*d*]*uring* the commission' of the offense. [Citation.] The term 'during' suggests temporal overlap: something that occurs throughout the duration of an event or at some point in its course. [Citation.] The term implies, at a minimum, a need for a temporal connection between the excluding conduct and the inmate's offense of conviction. Although the need to establish such a nexus imposes certain limits on the applicability of the firearm-related exception, [Proposition 36] could certainly have imposed an even stricter requirement for triggering the exception. (See [*Bland, supra*,] 10 Cal.4th [at p.] 1002 [interpreting the phrase "'in the commission'" to impose a "'facilitative nexus'" requirement].) Because [Proposition 36] does not do so, we may infer some kind of temporal limitation on the retroactive application of section 1170.12, subdivision (c)(2)(C)(iii)." (*Estrada, supra*, 3 Cal.5th at p. 670; accord, *Cruz*, *supra*, 15 Cal.App.5th at pp. 1111-1112 [Proposition 36 ineligibility "'requires a temporal nexus between the arming and the underlying felony, not a facilitative one'"]; *Osuna, supra*, 225 Cal.App.4th at p. 1032 [same].)

C. *The Trial Court Did Not Err in Finding Inzunza Was Ineligible for Resentencing Because He Had a Firearm Available for His Offensive or Defensive Use During Commission of the Crime*

Inzunza does not dispute he had a loaded handgun in his pants when the officers conducted a patdown search during his detention. As the superior court found, "[w]hen the defendant was stopped by the police, he had a loaded .25 caliber semi-automatic handgun in his pants." Thus, Inzunza was armed with a firearm during the commission of the crime because he had "the specified weapon available for use, either offensively or defensively." (*Bland, supra*, 10 Cal.4th at p. 997; accord, *Cruz, supra*, 15 Cal.App.5th at pp. 1109-1110.)

DISPOSITION

The order is affirmed.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.